IN THE

Supreme Court of the United States

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent

On Petition for a Writ of Certiorari to
The United States Court of Appeals For
The Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) and Opinion Sur Denial of Petition for Rehearing (Pet. App. B) are reported at 560 F.2d 209. The opinion of the District Court at No. 75-614 (W.D. Pa.) is not officially reported. (Pet. App. C)

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1977. The petition for a writ of certiorari was filed on October 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a denial of a class certification in a Title VII action is, per se, an immediately appealable order under 28 U.S.C. §1292(a)1 as an order constituting a denial of an injunction where the potential class representative is unable to meet the requirements of Fed. R. Civ. P. 23.

STATUTE AND RULE INVOLVED

28 U.S.C. 1292(a) provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

Rule 23, Fed. R. Civ. P., provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate

final injunctive relief or corresponding declaratory relief with respect to the class as a whole; * * *

* * * * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

STATEMENT

Petitioner Gardner unsuccessfully applied for employment with respondent Westinghouse Broadcasting Company's subsidiary station, KDKA, Pittsburgh, Pennsylvania. Thereafter, she filed charges of sex discrimination in the employment practices of respondent with the Equal Employment Opportunity Commission (EEOC) and the Pittsburgh Human Relations Commission. The EEOC found no cause in the charge and so notified petitioner.[1]

She then filed a complaint in the District Court for the Western District of Pennsylvania under Title VII of the 1964 Civil Rights Act, 28 U.S.C. §2000(e) *et seq.* seeking relief for herself and on behalf of the class she wished to represent.

Gardner asked the district court to determine a class. A hearing on her request was held on October 30, 1975. By memorandum opinion and order of February 4, 1976, the district court denied the requested class certification.

The court found that Gardner had not satisfied Rule 23(a)(2), Fed. R. Civ. P. because there were "no questions of law of fact common to the class she sought to represent" (Pet. App. C at 38a-39a). Nor had she satisfied Rule 23(a)(3), Fed. R. Civ. P. because her claim was "not typical of the claims of the members of the proposed class" (Pet. App. C at 39a). Nor had she satisfied Rule 23(a)(4), Fed. R. Civ. P. because she could not

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1. The Pittsburgh Human Relations Commission did not act on Petitioner's charge at *her* request that the matter be referred to the EEOC. (See Answer to Defendant's Interrogatory No. 6, Court of Appeals Appendix, p. 56A.)

fairly and adequately protect the interests of the purported class (Pet. App. C at 39a).

Without seeking or obtaining a certificate under 28 U.S.C. §1292(b), petitioner filed an appeal from the district court's order. She relied upon 28 U.S.C. §1292(a)1. For such jurisdictional base, she claimed a denial of injunctive relief.[2] Respondent Westinghouse filed a motion to dismiss the appeal for lack of jurisdiction.

Respondent Westinghouse's motion to dismiss was granted under order and opinion[3] of the Third Circuit dated June 6, 1977. The Court of Appeals held that to allow such an interlocutory appeal, absent qualification under any of the special judicial or legislative exceptions to the "final judgment rule" would frustrate the long-standing policy against affording pricemeal appellate review[4] and that §1292(a)1 was not designed to allow such an appeal where the order appealed from did not substantially affect or result in irremediable consequences to the outcome of the litigation. It concluded that the refusal to certify is always reviewable. It rejected the argument that the order of the district court caused immediate and drastic consequences.

Petitioner has now applied to this Court for a writ of certiorari to review the judgment of the Court of Appeals.

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2. She has now modified this by asserting in her petition that the permanent injunction she sought is the "heart" of the relief she sought. In her answers to interrogatories, however, she stated she filed suit because she wanted a job for herself: (Defendant's Interrogatory No. 4, p. 55A, Court of Appeals Appendix.)

3. Pet. App. A.

4. *Katz v. Carte-Blanche,* 496 F.2d 747 (3rd Cir. 1974).

ARGUMENT

1. The Court of Appeals was correct in concluding that the order of the district court denying class action certification was not a refusal to grant an injunction appealable under 28 U.S.C. 1292(a)(1). It noted (Pet. App. at A 6a) that a decision on class status "may be conditional, subject to alteration or amendment prior to final judgment, Fed. R. Civ. P. 23(c)(1)."

The court carefully considered the exceptions to the general rule on appealability. It followed the guidelines of this Court as expressed in *Switzerland Cheese, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966) and *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 249 (1955). It relied specifically upon this Court's holding that the §1292 exception to the finality doctrine is strictly limited and should not be expanded by *ad hoc* judicial exceptions.

This Court's recitation in *Baltimore Contractors, supra,* citing *City of Morgantown v. Royal Insurance Co.,* 337 U.S. 254, (1948), is dispositive of the matter:

> "Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

Given the nature of the Rule 23 order[5] and the scope of relief available generally in Title VII[6], no other result could be reached.

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5. Fed. R. Civ. P. 23(c)(1) provides that ". . . An order under this subdivision may be conditional and may be altered or amended before the decision on the merits."

6. Even in the case of an individual plaintiff under Title VII, the district court is empowered to enjoin a

Further review is not warranted.

2. Petitioner contends that there is a conflict between the views of the Third Circuit and the views of some of the other circuits. If, however, her case is measured by the standards of those other circuits—to the extent that such are different from those used by the Third Circuit—she would still fail.

By the standard of every circuit, she must demonstrate that injunctive relief was the heart of the litigation she instituted. Her failure so to do would be fatal to her hope for piecemeal review.

Petitioner herself described the heart of her case in answers to interrogatories:

> "4. Is your primary motivation in bringing this law suit to secure employment for yourself?
>
> "Answer: Yes." (Court of Appeals Appendix, 55a)

Further, as Chief Judge Seitz of the Third Circuit noted in his concurring opinion (Pet. App. A, 11a), Gardner did not request preliminary injunctive relief. She sought only permanent relief—relief which may be granted only after disposition of the entire case on the merits.

It should be apparent that her present effort to modify the primary purpose of her suit is no more than an example of the resiliency of a disappointed litigant.

In sum, she has failed to demonstrate that injunctive relief is the primary purpose of the suit. To the contrary,

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respondent from engaging in any "unlawful practice charged in the complaint" and to order "such affirmative action as may be appropriate." 42 U.S.C. 2000(e)-5(g) and 42 U.S.C. 2000(e)-16(d).

she has demonstrated that injunctive relief is *not* the primary purpose of her suit.

Thus, the conflict among the circuits she purports to see disappears when the particulars of her case are examined.

3. Two other arguments against granting review should be mentioned.

First, under this Court's holding in *United Airlines v. McDonald,* —— U.S. ——, 97 S. Ct. 2464 (1977), if petitioner loses in her individual claim and even if she chooses not to appeal, a member of the putative class may intervene and appeal from the denial of class certification.[7] Were petitioner to prevail in her individual claim, she would still be able to appeal from the class action certification denial, as so painstakingly explained by Chief Judge Seitz (Pet. App. A. at 13a-21a).

Second, this case does not warrant further review because petitioner's class action contentions were properly rejected by the district court. (See pp. 5 & 6, *supra*)

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7. The propriety of the district court's ruling concerning atypicality would be reinforced were Gardner to fail in her individual claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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